80-143

Supreme Court, U. S.
FILED
JUL 29 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

1980 TERM No._____

THELMA M. DETWEILER, Petitioner

vs.

MERRILL M. DETWEILER, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
PENNSYLVANIA

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The Petitioner, Thelma M. Detweiler, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, entered in this proceeding on May 1, 1980.

OPINIONS BELOW

There was no formal opinion of the Supreme Court of Pennsylvania. Its order denying the Petition for Allowance of Appeal is set forth in Appendix A.

JURISDICTION

The judgment of the court below was entered on May 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and 28 U.S.C. 2403(b) (Intervention by United States or a State; constitutional question.)

QUESTION PRESENTED

(1) Whether the Petitioner was deprived of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution when the Supreme Court of Pennsylvania denied a petition for allocatur in a divorce proceeding subsequent to the passage of a Divorce Reform Code Act No. 1980-26 which substantially altered the right of equitable distribution of marital property and introduced post-divorce alimony.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV - Section 1

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Pennsylvania Divorce Reform Code Act 1980-26 - Section 103:

> "...The provisions of this Act shall not affect any suit or action pending, but the same may be proceeded with and concluded either under the laws in existence when such suit or action was instituted, notwithstanding the repeal of such laws by this act, or upon application granted, under the provisions of this Act. The provisions of this Act shall not apply to any case in which a decree has been rendered prior to the effective date of the Act..."

Sections 401(d) through (f):

> "...(d) In a proceeding for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just after considering all relevant factors including:
>
> (1) Length of the marriage.
> (2) Any prior marriage of either party.
> (3) The age, health, station,

amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.

(4) The contribution by one party to the education, training or increased earning power of the other party.

(5) The opportunity of each party for future acquisitions of capital assets and income.

(6) The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits.

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.

(8) The value of the property set apart to each party.

(9) The standard of living of the parties established during the marriage.

(10) The economic circumstances of each party at the time the division of property is to become effective.

(e) For purposes of this chapter only, "marital property"means all property acquired by either party during the marriage except:

(1) Property acquired in exchange for property acquired prior to the marriage except for the increase in value during the marriage.

(2) Property excluded by valid agreement of the parties entered into before, during or after the marriage.

(3) Property acquired by gift, bequest, devise or descent except for the increase in value during the marriage.

(4) Property acquired after separation until the date of divorce, provided however, if the parties separate and reconcile, all property acquired subsequent to the final separation until their divorce.

(5) Property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the time proceedings for the divorce are commenced.

(6) Veterans' benefits exempt from attachment, levy or seizure pursuant to the act of September 2, 1958, Public Law 85-857, 72 Statute 1229, as amended, except for those benefits received by a veteran where such veteran has waived a portion of his military retirement pay in order to receive Veterans' Compensation.

(7) Property to the extent to which such property has been mortgaged or otherwise encumbered in good faith for value, prior to the time proceedings for the divorce are commenced.

(f) All property, whether real or personal, acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (e)."

"Section 501. Alimony.

(a) The court may allow alimony, as it deems reasonable, to either party, only if it finds that the party seeking alimony:

(1) lacks sufficient property, including but not limited to any property distributed pursuant to Chapter 4, to provide for his or her reasonable needs; and

(2) is unable to support himself or herself through appropriate employment.

(b) In determining whether alimony is necessary, and in determining the nature amount, duration, and manner of payment of alimony, the court shall consider all relevant factors including:

(1) the relative earnings and earning capacities of the parties.

(2) the ages, and the physical, mental and emotional conditions of the parties.

(3) The sources of income of both parties including but not limited to medical, retirement, insurance or other benefits.

(4) The expectancies and inheritances of the parties.

(5) The duration of the marriage.

(6) The contribution by one party to the education, training or increased earning power of the other party.

(7) The extent to which it would be inappropriate for a party, because said party will be custodian of a minor child, to seek employment outside the home.

(8) The standard of living of the parties established during the marriage.

(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment.

(10) The relative assets and liabilities of the parties.

(11) The property brought to the marriage by either party.

(12) The contribution of a spouse as homemaker.

(13) The relative needs of the parties.

(14) The marital misconduct of either of the parties during the marriage; however, the marital misconduct of either of the parties during separation subsequent to the filing of a divorce complaint shall not be considered by the court in its determinations relative to alimony."

Article 1, Section 1 - Inherent Rights of Mankind - The Constitution of the Commonwealth of Pennsylvania

> "All men are born equally free and independent, and having certain inherent and endefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation."

STATEMENT OF THE CASE

The substantive grounds for the initiation of the action in divorce by the Respondent in the lower courts of Pennsylvania are not at issue here. However, a brief description of the procedural history of the case in the Appellate courts of Pennsylvania in relation to the enactment of the Divorce Reform Code in April, 1980 is essential to an understanding of the legal issue presented before this Honorable Court. About October, 1978, the Petitioner appealed the decision of the lower court which entered a decree in divorce to the Superior Court of Pennsylvania. The Superior Court of Pennsylvania, on or about January 4, 1980 affirmed the decision of the lower court. On

March 6, 1980, the Petitioner filed a Petition for an Allowance to File an Appeal Nunc Pro Tunc, in the Supreme Court of Pennsylvania, which the Court denied on May 1, 1980. While the Petition for an Allowance to File an Appeal Nunc Pro Tunc was pending in the Supreme Court of Pennsylvania, the Legislature of the Commonwealth of Pennsylvania with the approval of the chief executive of Pennsylvania enacted the Divorce Reform Code (Act 26 of 1980), the first statute in the Commonwealth of Pennsylvania which effected drastic changes especially in the area of assignment of marital property for the first time in nearly two hundred (200) years.

In discussing the applicability of the provisions of the Pennsylvania Divorce Reform Code to cases presently pending and those cases in which a decree

in divorce had already been rendered, the statute draws a distinction and excludes those cases in which a decree in divorce has issued prior to the date of the statute's effectiveness, July 1, 1980.

In the instant case, the denial by the Supreme Court of Pennsylvania of the Petition for an Allowance to file an Appeal on May 1, 1980 in essence destroyed the right of the Petitioner to file an election pursuant to the provisions of the Pennsylvania Divorce Reform Code so as to preserve her right to seek alimony subsequent to divorce and to seek equitable distribution of the marital property, two features which were non-existent under the prior code and case law.

REASONS FOR GRANTING THE WRIT

I. This case presents a substantial federal question.

The issue at stake in the case at bar rests upon whether the Petitioner has a vested property interest in a cause of action which was enacted by the Legislature on April, 1980 and was to become effective on July 1, 1980 and whether the decision by the Supreme Court of Pennsylvania on May 1, 1980 which dismissed the Petitioner's appeal was violative of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and the Constitution of the Commonwealth of Pennsylvania.

In essence, the Petitioner, Thelma M. Detweiler, was barred from

filing an election to proceed in accordance with the Pennsylvania Divorce Reform Code, Act 26-1980 a right granted to all parties whose actions in divorce were presently pending in the lower courts of Pennsylvania (Section 103 of the Pennsylvania Divorce Reform Code - Act 26, 1980)

The recently enacted statutory provisions altered substantially the rights of the marital parties to seek a division of the marital property and to seek alimony subsequent to the entry of the decree in divorce. (Section 401(d) (f) and Section 502 of the Pennsylvania Divorce Reform Code).

Under the prior statute and common law under Pennsylvania (23 P.S. et seq.), the courts, distributed the marital property with respect to whether

the title was held individually or in some form of co-ownership. (DeFlorido v. DeFlorido, 459 Pa. 641, 331 A.2d 174 (1975)

The Pennsylvania Divorce Reform Code abolished these prior rules pertinent to the distribution of marital property and introduced the concept of "equitable distribution" (Pennsylvania Divorce Reform Code, Section 401) Thus, the financial position of the Petitioner would be enhanced if she were afforded the right to proceed under the newly enacted statute.

Dismissal of the Petitioner's appeal on May 1, 1980 shortly after the enactment of the Divorce Reform Code in April, 1980 deprived the Petitioner of due process of law in contravention of the Fourteenth Amendment to the United States Constitution and the Constitution

of the Commonwealth of Pennsylvania (see Gibbes v. Zimmerman, 290 U.S. 326, 78 L. Ed. 342, 54 S.Ct. 140 (19 33). If the Supreme Court of Pennsylvania had delayed two months in rendering its decision to dimiss Petitioner's appeal Petitioner's election to proceed under the recently enacted statute would have been preserved as her cause of action would have been pending on July 1, 1980. (Section 103 of the Pennsylvania Divorce Reform Code.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted:

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SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

456 City Hall
Phila., PA

May 6, 1980

Sanford H. Cohen, Esquire

Re: Thelma Detweiler v. Merrill Detweiler - No. 110 E.D. Misc. Docket 1980

Dear Mr. Cohen:

This is to advise you that on May 1, 1980, the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

SALLY MRVOS
Prothonotary

SM:br
cc: Barry Kerchner, Esquire

APPENDIX A

80-143

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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF

THE UNITED STATES

THELMA M. DETWEILER, 1980 Term
No._____

Petitioner

vs.

MERRILL M. DETWEILER,

Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Sanford H. Cohen, Esq.

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J. 1324/79

MERRILL M. DETWEILER,

Appellee

vs.

THELMA M. DETWEILER,

Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 3010, October Term, 1978

Appeal from the Order of October 20, 1978
Court of Common Pleas of Montgomery
County, Pennsylvania
Civil Action, Law No. 77-8677

Before CERCONE, P.J., HOFFMAN, J. and
WATKINS, J.

MEMORANDUM OPINION

Appellant (wife) in this divorce action contends that: (1) the lower court erred in reviewing the master's findings of credibility; (2) appellee (husband) failed to show indignities to the person; and (3) the husband was not the innocent and injured party. We disagree with appellant and accordingly, affirm the

order of the court below granting a divorce a.v.m.

The parties were married on June 1, 1958. The wife became pregnant in 1960, 1963 and 1968.[1] The children, each of whom suffered from severe birth defects, died shortly after birth. Although the parties developed sexual problems as a result of the deaths of their first two children, in 1968 they mutually planned the third pregnancy with the understanding that it would be the last. After the death of the third child, however, the parties' sexual problems increased and the husband began sleeping in a separate bedroom for varying periods of time.

In 1968 the wife began physically and verbally abusing her husband. She frequently hit him in the face and scratched his neck and back.[2]

As a result of these difficulties, the husband counselled with several ministers for a four to five month period. The husband's uncontroverted testimony also indicated that he discontinued his activities outside the home in 1968 in response to his wife's complaints that something was wrong.

After the third abnormal birth the wife cancelled the husband's scheduled vasectomy because she felt the operation would not solve the parties' sexual problem.[3] In 1971, the husband again undertook pastoral counselling but the wife refused to participate because she believed the advice of the clergy was male-oriented. The husband then sought consultation with a female psychologist but the wife refused to accompany him on his visits to her.

When the wife became pregnant for a fourth time in the spring of 1972, the violence and discord between the parties grew. The wife continued to strike and scratch her husband who occasionally responded by striking her. After the birth of their normal daughter, Valerie, the wife increased the number of attacks on her husband and threatened to harm Valerie if he did not "make things right".

In September of 1972, the husband left the home but returned upon his wife's request in January of 1973.[4] Several weeks later, however, the wife once again began to abuse her spouse verbally. She frequently made statements such as: "being married to you is a big tragedy"; "your love is like garbage"; "our marriage is worse than a concentration camp" and although he loved her

the feeling was "only one way". On three occasions, from 1973 to 1974, the wife brought a butcher knife to her husband and asked him to kill her because he had taken everything else from her, and might as well take her life. On the parties' fifteenth wedding anniversary, in response to the husband's wishes for a happy anniversary, the wife responded that being married to him was "a big tragedy" and refused to open her gift. In 1975 the wife returned to school because she felt that she was wasting her potential. The husband finally left home in January of 1978 because his wife told him the night before that he was worse than any drunk out in the street. In March of 1978 the husband filed for a divorce on the ground of indignities to the person. A master's hearing was

held in January of 1979.

The master recommended that the divorce be denied. He concluded that the parties' problems resulted from the husband's "insatiable drive" to reproduce. The lower court, however, rejected this conclusion, noting to the contrary that the wife had become pregnant only four times in eighteen years of marriage, had refused to use any means of birth control, and agreed to the third pregnancy, and had cancelled the husband's appointment for a vasectomy in 1971.

The lower court also rejected the master's finding that the wife was "a person of greater sensibility and deeper intellect" than the husband and that the deaths of their children therefore had a greater impact on her, justifying her abuse of her husband. This conclusion was not supported by

the facts as viewed by the lower court because the husband gave up his outside activities in 1968 in order to spend more time with his wife, he sought help from a female counsellor in response to her complaints, he supported her decision to return to school, he left home because he could see that remaining together was harming everyone involved, and after leaving home the husband continued to support his family voluntarily. The wife, however, threatened to strangle her daughter or to throw her out of the window if her husband did not correct the problems with their marriage. The lower court, therefore, declined to follow the master's recommendation and granted the divorce on the ground of indignities.

Appellant's contention that the lower court improperly rejected the

master's findings of credibility is without merit. Generally, "[t]he lower court need not accept the findings of the master and can make its own determination. Our Court is also duty-bound to make a complete and independent investigation of the evidence in order to discharge our obligation." Ryave v. Ryave, Pa. Superior Ct. , , 375 A.2d 766, 770 (1977) (citations omitted). Where issues of credibility best resolved by personal observation are involved, however, the reviewing court must give great weight to the findings of the master. Gehris v. Gehris, 233 Pa. Superior Ct. 144, 148, 334 A.2d 753, 755 (1975). But even in matters of credibility, the master's findings may be rejected where the court determines that those findings have no basis. Ryave v. Ryave, supra.

In the case at bar, the lower court properly made an independent review of the testimony presented at the master's hearing. Our de novo review of the record confirms the conclusion that despite the weight accorded the master's determination of credibility two of the findings were without foundation. The wife admitted that she had refused to use any means of birth control, that she had opposed her husband's vasectomy, and that she had agreed to the third pregnancy. It is difficult to comprehend, therefore, how the master could have accepted the wife's assertion that her husband was using her as a "baby machine". Similarly, the conclusion that the wife's actions were justified by her more sensitive and intelligent nature was unjustified. The husband's frequent

consultation with counsellors reveals a sensibility to the problems encountered by the couple in their marriage. Moreover, he attempted to consult with a female psychologist in order to be responsive to his wife's wishes. The husband gave up his activities outside the home in response to his wife's complaints about their marriage, and he continued to support the family even after he deemed reconciliation impossible. In addition, the husband financially supported her return to college and accepted some of the burden of housework so that she could study. The wife, on the other hand, manifested insensitivity by making cruel statements to her husband, including threats that she would throw her daughter out of the window or strangle her if her husband did not "make things right". On these facts, we conclude that the lower

court was correct in rejecting the master's findings that the wife was the more sensitive and intelligent spouse.

Appellant's second contention is equally without merit. Indignities "may consist of vulgarity, unmerited reproach, habitual contumely, studied neglect, intentional incivility, manifest disdain, abusive language, or malignant ridicule". Hargrove v. Hargrove, Pa. Superior Ct. , , 391 A.2d 143, 148 (1977). Moreover, the conduct of the offending spouse must be such as to render the innocent spouse's life burdensome or condition intolerable. 23 P.S. §10(1)(f). The wife herein subjected her husband to continual verbal and physical abuse[5] and threatened their child. As a result of this conduct, the husband's condition

was rendered so intolerable that he left the marital abode. We conclude that the wife's course of conduct rose to the level of indignities.

Appellant's final contention is that the husband was not the innocent and injured spouse. See 23 P.S. §10(1). In order to be innocent and injured within the meaning of the divorce statute, a party need not be wholly free from fault. McCaskey v. McCaskey, Pa. Superior Ct. , 385 A.2d 378 (1978). Although the husband in this case did occasionally retaliate against his wife's physical abuse by slapping her and tended to be verbally unresponsive to her complaints, his actions did not justify those of the wife. We therefore conclude that the husband was the injured and innocent spouse. Consequently, we affirm the order of the court below granting a divorce a.v.m. on the ground of

indignities to the person.

Order affirmed.

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1. In 1963, shortly after the death of the second child, the parties adopted an infant girl, and in 1972, the wife gave birth to a normal baby girl.

2. At the master's hearing, the husband presented a witness who corroborated his testimony regarding the scratches on his face and neck.

3. The husband did eventually obtain a vasectomy without his wife's permission in 1975.

4. The husband left the home several times between 1971 and 1977 for periods ranging from a few days to several

months.

5. The master did not consider the physical abuse of the husband in reaching his decision because he concluded that the concept of condonation applied. Where, however, subsequent to a reconciliation new acts of indignity occur, the old conduct is revived and will be considered by the court. See Schwartz v. Schwartz, 193 Pa. Superior Ct. 628, 630, A. 2d , (1960).